

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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5 In re:) Civil 05-MD-1708 (DWF/AJB)
6)
7 GUIDANT CORPORATION) STATUS CONFERENCE
8 IMPLANTABLE DEFIBRILLATOR)
9 PRODUCTS LIABILITY)
LITIGATION,)

10 This Document Relates)
11 To All Actions) 9:15 o'clock, a.m.
12) April 25, 2007
13) Minneapolis, Minnesota
14 -----

15 THE HONORABLE JUDGE DONOVAN W. FRANK

16 THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN

17 UNITED STATES DISTRICT COURT JUDGES

18 STATUS CONFERENCE PROCEEDING
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1 (In open court.)

2 THE HONORABLE JUDGE FRANK: Thank you. You
3 may be seated. We are trying to travel with an
4 entourage, now. So, if you saw the group that came in,
5 it shouldn't be mistaken for the Muhammad Ali entourage
6 from years ago. But, we can proceed with the --
7 welcome, everyone to the 15th floor of the Minneapolis
8 Courthouse. We can proceed with the report.

9 I will just indicate, and counsel can say as
10 they wish, we discussed in chambers: With respect to
11 item 3, which is denoted, "Issue raised in Plaintiffs'
12 letter brief (Defendant's expert witness disclosures);"
13 item five, "Myerburg Deposition Scope;" six, "Motion to
14 quash (Clasby trial)." There were two orders entered in
15 the last 48 hours by me, one yesterday, that addressed
16 these issues.

17 So, for those of you that are in the room
18 that were not in chambers, they really weren't discussed
19 this morning. The procedure we have got set up will
20 either be a ruling off the Bench like we did at the last
21 hearing, or an order that is then turned around within
22 24 hours or two days as we did this week.

23 So, whether counsel wants to address that to
24 Judge Boylan or myself, it's up to you. So, we can
25 proceed whenever you are ready.

1 MR. ZIMMERMAN: Good morning, Your Honors.
2 Charles Zimmerman, co-lead counsel for the Plaintiffs
3 Steering Committee. And we appreciate the speed in
4 which these responses are coming from our letter
5 briefing and the matters that are on these Tuesday
6 calendars every, I guess, three Tuesdays out of four
7 that the Court has implemented in regard to the new
8 procedure for getting quick resolution of matters.

9 It is really helping us to proceed with
10 keeping on schedule for the representative trials and
11 allowing us to not have to wait for decisions and be
12 kind of stuck in place. I just can't tell you how
13 helpful it is. We don't always in all due respects
14 necessarily agree with every decision, but we certainly
15 appreciate the promptness and appreciate the mechanisms
16 that the Court has set in place. So, I just wanted to
17 say that.

18 And for the people that aren't privy to them,
19 they are contained in your instructions, I think, on
20 April 20 -- no. Well, you sent us a letter, I believe.

21 THE COURT: And we did, and that is out on
22 the web.

23 MR. ZIMMERMAN: ECF, yes. And it is actually
24 quite cutting edge. I haven't seen that before, done
25 that way, and I want to thank you very much for taking

1 on that initiative and being willing to respond in such
2 quick time.

3 We have an agenda that has also been posted
4 as kind of the "Proposed Joint Agenda for Status
5 Conference on April 25," and we did have a pretrial
6 meeting, pre-conference meeting with the Court that
7 concluded about 15 minutes ago.

8 Many of those items that the Court said have
9 been resolved by the orders that I just referenced, the
10 Amended PTO 32, and the letter from the Court, I
11 believe, dated -- I believe, was it the 22nd, the Order?
12 I don't have it in front me.

13 THE COURT: In that neighborhood.

14 MR. ZIMMERMAN: In that neighborhood, April
15 22nd. So, very soon before that, of April 24.

16 First off, Your Honor, we have the status of
17 cases filed in Federal Court and transferred into the
18 MDL. Normally Mr. Pratt gives that report as to the
19 number of cases filed, transferred and what is pending
20 in State Court, so I will allow Mr. Pratt to come
21 forward to provide that.

22 MR. PRATT: Your Honor, this is always a
23 heavy-lifting part for me where I have to come up with
24 these numbers.

25 Here is where we are with respect to the case

1 numbers. There are 1,329 cases actually pending here in
2 the MDL in front of Your Honor. There are a total of
3 1,346 Federal Court cases. Obviously, the difference
4 between the two is that some of them are pending
5 transfer here.

6 There are currently 105 State Court cases,
7 most of whom, percentage-wise, are pending in State
8 Court here in Minnesota, consolidated before Judge Leary
9 in Ramsey County.

10 There are, because Mr. Zimmerman always asks
11 me, in those cases in the MDL a total of 2,249 device
12 Plaintiffs, and that is in the 1,329 cases.

13 I thought I would also mention this, because
14 it adds a little context to these numbers. We have in
15 this MDL about five different broadly-stated product
16 lines. All of them are caught in some form or fashion
17 into recalls back in the summer and fall of 2005. We
18 have the Prizm 2, Model 1861, which is the one that was
19 publicized in the New York Times publications. We have
20 Renewal 1 and 2, separate defibrillator product lines.
21 We have Renewal 3 and 4, a different defibrillator CRT
22 product line. We have AVT, which is a different
23 defibrillator product line, and then we have the
24 pacemaker products, broadly stated. So, we put them
25 into five different categories.

1 I thought you might be interested in the
2 scatter of your MDL cases across those product lines.
3 There is some imprecision that comes into play, here,
4 because in some respects the scatter isn't clearly
5 stated or alleged.

6 But, what we have been able to divine in a
7 general way is that of the cases pending here in the
8 MDL, about 25 percent of them are the Prizm 2, Model
9 1861. About 10 percent of them are the Renewal 1 and 2
10 product line cases.

11 Approximately 20 percent are Renewal 3 and 4
12 product line defibrillator cases. Approximately 15
13 percent represent the AVT product line defibrillator
14 line. And then approximately 15 percent are captured by
15 the pacemaker physician advisors.

16 We also have, when you add those up, you
17 don't get to 100. That is because there are several
18 cases pending before you that have not being captured in
19 any of those recalls. So, that gives you some
20 dimensions of the numbers of the spread in a roughly
21 stated, somewhat imprecise way. But, I thought that
22 would be helpful context for what we are dealing with
23 here, Your Honor.

24 THE COURT: Thank you.

25

1 MR. ZIMMERMAN: Your Honor, the next item on
2 the agenda, unless there are questions about the status
3 of cases is the report on the representative trial
4 process.

5 We are reporting that parties, both sides,
6 are moving with amazing diligence and speed to prepare
7 these cases for the trial dates that the Court has set.
8 And every indication, in fact every commitment is that
9 we will be ready for trial on the date set, and that the
10 process is going smoothly.

11 There are issues that arise, and the issues
12 that get resolved, either to meet and confer, or by
13 direction of the Court. But, in terms of a general
14 report on the representative trial process, it is going
15 extremely well, it is extremely cooperative. There is a
16 lot of heavy lifting going on by both sides and a
17 tremendous amount of process of information, and
18 discovery that is taking place by the trial teams. But,
19 we are here to report that it is going very smoothly and
20 we will be ready for trial on the date set.

21 MR. PRATT: Just a bit more detail on that,
22 Your Honor. We have almost completed, we meaning
23 Guidant, the depositions of the Plaintiffs' experts. I
24 think we have maybe one left to go, a gentleman by the
25 name of Dr. Jewell, whose deposition will be taken in

1 London.

2 The Plaintiff Steering Committee has started
3 the process of deposing Guidant's experts. And I think
4 they have deposed one to this point. And I agree with
5 everything that Mr. Zimmerman said. The depositions
6 have been handled civilly. They are proceeding without
7 much -- many battles, and we are moving ahead, I think
8 toward the July 27 jury selection date.

9 I will also mention, Your Honor, because we
10 mentioned it in one of your orders, you had a fact
11 discovery deadline in all five of the bellwether cases
12 of May 1. We talked about moving that, we have
13 submitted a proposal to the Plaintiff Steering Committee
14 as we discussed with you this morning that we hope will
15 sort of give us a rolling deadline for the preceding
16 bellwether trial Plaintiffs. I think that will be
17 something almost certainly we will be able to work out
18 without much judicial discretion having to be applied.

19 MR. ZIMMERMAN: Buried within the
20 representative trial process are the nine motions that
21 have been made by the Defense. And those are set for
22 trial -- set for hearing on May 18th before Your Honor,
23 except I think we agreed in chambers that one motion
24 will be moved --

25 THE COURT: To June 8th.

1 MR. ZIMMERMAN: June 8th.

2 THE COURT: The same date that is set for the
3 Daubert hearings right now?

4 MR. ZIMMERMAN: Correct. And that will be
5 the learned intermediary motion, because there is some
6 prerequisite discovery that has to take place and will
7 be taking place after.

8 THE COURT: Then I think we agreed this
9 morning, that when you are in town on the 18th, Judge
10 Boylan and I will be getting together with you the late
11 afternoon, evening before to do the informal conference
12 we typically do at 8:00 in the morning.

13 MR. ZIMMERMAN: Right. That is correct.

14 THE COURT: We will put that, the fact of
15 that conference out on the web so people know what
16 happened to that meeting. Well, it is going to be that
17 late afternoon of the 17th, so --

18 MR. ZIMMERMAN: So, the motion issue that is
19 on everybody's radar screen, I believe, our response,
20 the Plaintiffs' Response to the Defense Motion is going
21 to be received by Your Honor and filed and served on May
22 2nd. As I understand we had agreed to an additional two
23 days, one day beyond May 1st, where our response would
24 be due and filed and served on May 2nd.

25 Number three on the calendar, Your Honor, is

1 the issues raised in Plaintiffs' letter brief. It had
2 to do with the Defendant's expert disclosures under the
3 rules. And the Court has issued its view on that and we
4 understand it. And it will be abided, it will certainly
5 be abided by.

6 THE COURT: I think in fairness to the
7 parties, I will just acknowledge, and you can just say
8 what you wish, there was an exchange between the two
9 groups in chambers this morning and it looks to me like
10 there is probably going to be a meeting of the minds on
11 these, at least in this categories, the 22 Guidant
12 folks, with or without this. So --

13 MR. ZIMMERMAN: Yes, some offers were made in
14 chambers as to the clarification of that. And we are
15 going to meet on that and hopefully get it resolved so
16 it doesn't become an issue. And just for people who
17 were affected -- this simply has to do with what the
18 scope of testimony will be consistent with the expert
19 disclosures, the 22 that are disclosed. It is going to
20 try and narrow that, the Defendants are, to the number
21 that is actually going to testify, as opposed to having
22 more open-ended disclosure and not knowing the opinions
23 of those experts.

24 So, if there is no more discussion on that,
25 the next item is a schedule for following representative

1 cases. I am not even sure what that means, exactly,
2 except I know we had a discussion that we were going to
3 meet and confer further with regard to that. I am
4 confused as to --

5 MR. PRATT: I think I jumped the gun. I
6 think that involves the fact discovery deadline of May 1
7 that we are now in the process of discussing, so we can
8 resolve some of the deadlines that apply to, you know,
9 seeking trials beyond the final fifth case for trial.

10 I think that is a matter that we're
11 discussing among ourselves that I believe we will be
12 able to reach an agreement.

13 MR. ZIMMERMAN: The next issue, Your Honor,
14 is the Myerburg Deposition scope. And again, that was
15 resolved or ordered -- the parameters of that were laid
16 out in the Court's Order. We understand it, and the
17 deposition will take place.

18 We don't know if under those rules and
19 guidelines, we don't know if Dr. Myerburg, who is by the
20 way the chairman of the Independent Panel, as most
21 people in the courtroom know, his deposition will take
22 place. We know the documents and the transcripts that
23 we are going to receive.

24 We understand that the Court has ordered it
25 to take place by May 18th, or a date mutually agreed --

1 or, May 15th. I don't believe we are going to make that
2 May 15th date, because Dr. Myerburg only had a very
3 short period of time that he could sit between now and
4 then, but we will find a mutually agreeable date. And
5 that will probably be sometime in early June.

6 We did discuss with the Court that because it
7 is an important deposition, because of Dr. Myerburg's
8 standing as head of the Independent Panel, and because
9 he was one of the treating doctors in the first
10 representative trial, that we want that deposition to go
11 smoothly. And we ask that maybe the Court be present in
12 person or through live feed of the deposition
13 transcript. So that if any issues come up during this
14 important deposition, the Court will be available to
15 respond to any objections or any concerns with regard to
16 scope. Because there is an interesting order that has
17 come out that we have to abide by with regard to scope
18 of that deposition. So, we think we are in good shape
19 for that now, Your Honors, in terms of the parameters
20 have been set, the fields have been outlined for us.
21 And now we are just going to get the date and do the
22 work.

23 MR. PRATT: I think Mr. Zimmerman accurately
24 stated the situation as it now stands.

25 THE COURT: All right.

1 MR. ZIMMERMAN: Motion to Quash with regard
2 to the Clasby issue, that has been resolved. The Motion
3 to Quash was, I believe, denied and we are moving
4 forward.

5 The next is the Contak Renewal representative
6 trial process. And this is simply the trial -- the
7 bellwether trials or the representative trials after the
8 five that are in the box now. What we agreed to do is
9 meet and confer with regard to laying out some
10 parameters for selection and teeing up of cases in the
11 other product lines that Mr. Pratt discussed, the
12 Renewal 1's and 2's, the Renewal 3's and 4's, and the
13 AVT's, and the pacemakers. And we are going to meet and
14 confer and try and come up with something. If we can't,
15 we are going to submit it to Your Honors, and you are
16 going tell us how that next wave of trial will be done.

17 THE COURT: I thought what we could do, not
18 inconsistent with what you observed with having due
19 regard for not getting too many distractions to the
20 existing trial schedule for the cases coming up, but
21 also to let the people know inside of the case and maybe
22 more importantly people looking from afar, other
23 plaintiffs, into website and elsewhere, we will roll-out
24 a short order just requesting that the parties discuss
25 those issues about what device to move on with next, a

1 general order of presentation.

2 I think the kind of commitment we made is
3 that no matter what is rolled out or when, we will give
4 calendar priority to the cases so there won't be any
5 reaction by the Court here in Minnesota saying, well, we
6 can't get to those, even though you are ready to go. We
7 will get to them whenever everybody is ready to go. An,
8 it is apparent to us, there is going to be some
9 discussion on what device and the timing and some other
10 issues. I don't know if Mr. Pratt wants to be heard
11 additionally on that.

12 MR. PRATT: Well, I think as we discussed, we
13 are all pretty busy on the 1861 bellwether process right
14 now. But, I think we all agree that we ought to take a
15 look beyond that and see where we think we ought to go
16 with this MDL. So, your order is simply going to
17 instruct us to do so.

18 What is the next phase, the timing of the
19 next phase, that I think will precipitate some early
20 meetings and perhaps a resolution to those kinds of
21 issues.

22 THE COURT: All right.

23 MR. ZIMMERMAN: The last item, Your Honor, is
24 as you referenced, the next status conference. There
25 actually isn't going to be a formal status conference,

1 it is going to be an informal status conference like
2 what we had in chambers before the formal status
3 conference that we had today.

4 This is going to take place May 17th at 5:00
5 p.m.. And the reason we are doing it is because there
6 are some other scheduling conflicts that everyone has.
7 And the next day, May 18th, we are going to have this
8 omnibus motion hearing before Your Honors.

9 So, we agreed to meet and discuss how that
10 omnibus motion hearing was going to take place the next
11 day on the 18th so we could set the road map there and
12 then do any status issues that we have at the same time
13 informally.

14 So, there won't be a formal status conference
15 in May, it will be informal, dovetailed into the
16 preparation for the May 18th omnibus motion hearing.

17 With that, Your Honor, I don't have anything
18 further. I don't know if Mr. Pratt has anything
19 further.

20 MR. PRATT: No, I think that pretty well
21 covers all of the agenda items that we discussed. On
22 the formal agenda, I think it resolves and summarizes
23 all of the discussions we had in the informal
24 conference.

25 I will echo what Mr. Zimmerman said, which

1 is, we do appreciate some of the quick attention to the
2 outstanding motions and issues that have been raised in
3 the course of this.

4 I think we will continue that process. We
5 will still probably have to file some motions to deal
6 with the real substantive issues, but in the main, the
7 little ones, I think, will be taken care of without much
8 flare and fight being done. Thank you, Your Honor.

9 THE COURT: Can you approach the bench, the
10 two of you?

11 MR. ZIMMERMAN: Which way do you approach it?

12 (Discussion off the record.)

13 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
14 Anyone else in the courtroom want to bring anything to
15 our attention?

16 THE COURT: Mr. Zimmerman, anything else they
17 probably thought there was some issue about decorum in
18 the -- so, anything else on behalf of the Plaintiffs?

19 MR. ZIMMERMAN: No, Your Honor. I would just
20 instruct the students it gets tougher from here. That
21 was a softball you got. Next time it gets a little
22 tougher.

23 THE COURT: Anything further on behalf of the
24 Defendants?

25 MR. PRATT: I worried a little bit. These

1 aspiring young lawyers are watching us do our thing in
2 here and they are saying to themselves, that wasn't too
3 hard. Are these guys getting paid for this? Sometimes
4 it gets a little harder than this.

5 MR. ZIMMERMAN: Well, you are. Sometimes you
6 don't get paid for it, either.

7 MR. PRATT: That is all we have.

8 THE COURT: We are adjourned. Thank you very
9 much.

10 (Adjournment.)

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14 Certified by: _____

15 Jeanne M. Anderson, RMR-RPR
16 Official Court Reporter

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